Date: December 18, 1997

Case No.: 96-INA-00370

In the Matter of:

RCG INFORMATION TECHNOLOGY, INC.,
Employer

On Behalf Of:

MARIVIC DANTES MARIFOSQUE,
Alien

Appearance: Richard B. Solomon, Assistant Counsel
For the Employer/Alien

Before: Huddleston, Lawson, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On November 7, 1994, RCG Information Technology, Inc. ("Employer") filed an application for labor certification to enable Marivic Dantes Marifosque ("Alien") to fill the position of Programmer/Analyst (AF 16). The job duties for the position are:

> Design, develop, code, test, implement and maintain systems for commercial and financial applications, using RPG/400 in an IBM AS/400 environment.

The requirements for the position are a Bachelor's Degree in Business Administration, Computer Science, Engineering, or Math and two years of experience in the job offered.

The CO issued a Notice of Findings on February 22, 1996 (AF 59-63), proposing to deny certification on the grounds that the Employer failed to establish that several U.S. workers were rejected solely for lawful, job-related reasons. In addition, the CO noted that the Employer required at least one U.S. applicant to take a test. Accordingly, the CO instructed the Employer to document that it is usual practice in its industry to administer a practical test without notice as a condition of hire. Furthermore, the CO requested that the Employer establish that such a test was given to the Alien.

Accordingly, the Employer was notified that it had until March 28, 1996, to rebut the findings or to cure the defects noted.

In its rebuttal, dated March 18, 1996 (AF 64-85), the Employer contended that the ability to perform basic technical functions is implicit in the job duties and the most reasonable way to determine whether an applicant possesses this ability is to administer a technical test. The Employer further explained that it has routinely administered a technical test to all its prospective employees and all of its current employees have taken and passed the technical test prior to their hire. The Employer included an excerpt from a book containing sample technical questions to prepare individuals for technical evaluations on job interviews. In addition, the Employer provided a copy of the test given to applicants. Finally, regarding the U.S. applicants, the Employer stated that one applicant only scored 40% on the test given during the interview and the two other applicants questioned by the CO informed the Employer that they had full-time jobs and, therefore, were not interested in the job opportunity.

---

[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

The CO issued the Final Determination on April 3, 1996 (AF 86-88), denying certification because the Employer failed to establish that it rejected two U.S. applicants for lawful, job-related reasons.

On April 26, 1996, the Employer requested review of the Denial of Labor Certification (AF 95-106). The CO denied reconsideration on May 6, 1996, and forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

Section 656.20(c)(8) provides that the job opportunity must have been open to any qualified U.S. worker. As such, employers are required to make a good-faith effort to recruit qualified U.S. workers for the job opportunity. *H.C. LaMarche Ent., Inc.*, 87-INA-607 (Oct. 27, 1988). Further, § 656.21(b)(7) provides that an employer must show that U.S. applicants were rejected solely for lawful, job-related reasons. Therefore, actions by the employer which indicate a lack of a good-faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient U.S. workers who are "able, willing, qualified and available" to perform the work as required by § 656.1.

In this case, the CO found that the Employer failed to establish that he engaged in a good-faith recruitment effort (AF 60-61). Specifically, the CO questioned whether two U.S. applicants, Mr. Glukman and Ms. Gorkhover, were rejected solely for lawful, job-related reasons. In its recruitment report, the Employer stated that both applicants responded to its mailgram and stated that they had accepted another full-time position and, therefore, were no longer interested in the job opportunity (AF 43). However, in response to questionnaires sent by the New York State Department of Labor, both applicants stated that they were contacted by mail; but, the Employer never requested an interview (AF 36-37, 40-41). Moreover, both applicants stated that they were available to work for the Employer and possess the requisite qualifications. Therefore, the CO, in the NOF, requested that the Employer document its recruitment efforts regarding these applicants to establish that it engaged in a good-faith recruitment effort (AF 60).

In rebuttal, the Employer stated that both applicants advised him that they were employed full time and were not interested in the job opportunity (AF 81). In addition, the Employer submitted copies of the letters sent to each of the applicants (AF 66-67).

Where an employer's statements concerning contact of an applicant during recruitment are contradictory to and unsupported by the applicant's statements, the CO may properly give greater weight to the applicant's statements. *Robert B. Fry, Jr.*, 89-INA-6 (Dec. 28, 1989); *Jersey Welding & Fence Co.*, 93-INA-43 (Oct. 13, 1993). As noted above, two U.S. applicants in this case independently contradicted the Employer regarding his recruitment efforts. We further find it suspect that neither the Employer's recruitment report, nor its rebuttal supplies any details regarding its contact with either of these applicants (AF 43, 81). For instance, the Employer did not supply any dates that he spoke with the applicants. In fact, the Employer merely stated that both applicants stated that they had full-time jobs and were not interested in the job opportunity at issue in this case. A recruitment report must give the details of the employer's contact with

applicants to be sufficient. *Yaron Development Co., Inc.*, 89-INA-178 (Apr. 19, 1991) (*en banc)*. Thus, based on the Employer's lack of detail concerning his contact with these applicants, and the contradictory accounts given by both Mr. Glukman and Ms. Gorkhover, we give greater weight to the applicants' statements regarding the Employer's contact.

We emphasize that the burden is on the Employer to show that he engaged in good-faith recruitment of U.S. applicants. Based on the foregoing, we that the Employer has not met this burden with regards to Mr. Glukman or Ms. Gorkhover. Accordingly, the CO's denial of labor certification is hereby AFFIRMED.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

_____

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.